The order of the Magistrate is affirmed and the money to be returned to the owner i.e. proceeds of sale of the goods and amount paid for the lorry.

RE: KAMAL BAHARIM BIN HUSSAIN; *EX PARTE*: PUBLIC FINANCE BHD.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[BANKRUPTCY NO. 29-380-92]
19 MAY 1993

BANKRUPTCY: Non-compliance of demand contained in bankruptcy notice - Bankruptcy notice issued based on judgment in default - Section 92 Bankruptcy Rules 1969 - Application by debtor for extension of time to file an application to set aside bankruptcy notice and for bankruptcy notice to be set aside - Inherent jurisdiction of Court - Miscarriage of justice - Debtor did not give notice of dispute as provided under s. 3(2)(ii) of Bankruptcy Act 1967 - Whether debtor can challenge validity of bankruptcy notice - Affidavit in support of application to set aside bankruptcy notice - Whether filing of affidavit constitutes sufficient notice to creditor within meaning of s. 3(2) of Act.

This was an application by the debtor firstly, for an extension of time to file an application to set aside the bankruptcy notices; and secondly, for the bankruptcy notice to be set aside with costs.

Held:

[1] The affidavit in support of the debtor's application to set aside the bankruptcy notice constituted sufficient notice to the creditor within the meaning of s. 3(2) of the Bankruptcy Act 1967.

[2] The time expired to file the application to set aside the bankruptcy notice was extended forthwith to enable the application to set aside the bankruptcy notice to be heard.

[3] The proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 was limited to excess demand and therefore not applicable to the instant case where the demand for payment in the bankruptcy notice was not in accordance with the terms of the judgment in default as required under s. 3(1)(i) of the Bankruptcy Act 1967. In the instant case, the demand for payment in the bankruptcy notice was in accordance with the terms of an agreement subsequently entered by the parties.

[4] In the circumstances, non-compliance with such notice would not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967.

[5] It is trite law that a statute relating to bankruptcy should be construed in a manner most favourable to the person affected. For the reasons adumbrated above, the debtor's application to set aside the bankruptcy notice was allowed with costs.

[Application for extension of time to file application to set aside bankruptcy notice allowed. Bankruptcy notice set aside].

Cases referred to:
Re Arunachalam ex parte Indian Overseas Bank Ltd. [1968] 1 MLJ 89 ***(refd)***
Re Stanger [1883] 22 Ch D 436 ***(refd)***
Re Khoo Kim Hock [1974] 2 MLJ 29 ***(refd)***
In re Fraser, ex p. Central Bank of London [1892] 2 QB 633 ***(refd)***
Datuk Mohd Sari bin Datuk Haji Noor v. Norwich Winterthur Insurance (M) Sdn. Bhd. [1992] 4 CLJ 1798 ***(foll)***
In re North, ex parte Hasluck [1895] 2 QB 264 ***(cit)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), (2)(ii), 92(1), 93(4), 105(1)
Bankruptcy Rules 1969, s. 92, r. 95(1)

Other sources referred to:
Halsbury's Laws of England, Vol. 3, 4th Edn., para 457

For the judgment debtor: Pu Kit Lai; M/s. K.L. Pu & Co.
For the judgment creditor - Yap Wai Kheong; M/s. Choong Yik Son & Fiona Ghaus

JUDGMENT

Haji Abdul Malik Bin Haji Ishak JC:
On 18 February 1991 the debtor took on hire purchase from the creditor a car bearing registration number ABV 4368. By the hire purchase agreement, the debtor contracted to pay by monthly instalments RM505 beginning from 18 February 1991 to the creditor till the final payment (the last monthly instalment being RM461.25 sen). The debtor failed to pay the monthly instalments from March 1991 till August 1991 whereupon there was a breach of the hire purchase agreement. The creditor caused a summons to issue against the debtor for the sum of RM30,310.90 sen together with interest thereon at 8% per annum from 17 August 1991 until realization and costs. The computation used to arrive at the said RM30,310.90 sen was set out in the particulars of the claim in the statement of claim as follows:

BUTIR-BUTIR

Jumlah Amaun yang perlu dibayar	...	RM 34,756.25
TOLAK:		
Bayaran	...	RM 4,499.00
TAMBAH:		
Kos mengepos	...	RM 3.40
Faedah ke atas ansuran yang perlu dijelaskan dari 18/3/91 ke 16/8/91 (Tarikh penamatan kontrak)	...	RM 50.25
		RM 30,310.90

The debtor failed to enter an appearance and on 1 November 1991 a judgment in default was entered against the debtor by the Judge, Sessions Court, Taiping. On 24 April 1992 the creditor applied for the issue of bankruptcy notice (enclosure 1) under s. 92 of the Bankruptcy Rules 1969 enclosing therein the relevant bankruptcy notice (enclosure 2). This bankruptcy notice was founded on the said default judgment.

The affidavit of service in enclosure (3) averred that the debtor was in receipt of the bankruptcy notice on 22 June 1992. On 22 July 1992 a creditor's petition (enclosure 6) was filed, the act of bankruptcy relied upon by the creditor being the non-compliance of the demand contained in the bankruptcy notice. On 2 February 1993, before the creditor's petition was heard, the debtor applied to the Bankruptcy Court (enclosure 11) firstly, for an extension of time to file an application to set aside the bankruptcy notice; and secondly, a prayer for the bankruptcy notice to be set aside with costs.

The bankrupt now throws himself to the mercy of the Bankruptcy Court and applies, presumably invoking s. 92(1) of the Bankruptcy Act 1967 as well as the inherent jurisdiction of the Court to make relevant orders where a miscarriage of justice had occurred. Section 92(1) of the Bankruptcy Act 1967 reads as follows:

> 92(1) The Court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

The grounds of the debtor's application were set out together with his application entitled "Afidavit Di atas Permohonan Untuk Mengenepikan notis kebankrapan" (see enclosure 11). Unfortunately, there was no affidavit in reply affirmed by the creditor to challenge the application.

On 12 February 1993, the matter came up for disposal where Counsel for the debtor and creditor were present. The representative from the Official Assignee's office was also present. But the matter could not be disposed of because of the constraint imposed by r. 95(1) of the Bankruptcy Rules 1969 in that there was absence of "not less than three clear days' notice". Rule 95(1) of the Bankruptcy Rules 1969 reads thus:

> 95(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

On 15 March 1993 when the matter came up for hearing Puan Pu Kit Lai Counsel for the debtor argued, *inter alia*, that the debtor had a good defence to the creditor's claim; that there was an application to set aside the judgment in default in the Sessions Court, Taiping (though not heard as yet), that the debtor had paid RM3,055 as per exhibit "KBH1" to the creditor (such payment agreed between both parties) and therefore there was excess.

Before I examine the merits of the debtor's application to set aside the bankruptcy notice (enclosure 11), I must first consider the preliminary point that has been raised by Encik Yap Wai Kheong, Counsel for the creditor to the effect that at this juncture, it is not open to the debtor to challenge the validity of the bankruptcy notice because no notice of dispute by reason of such excess as referred to in proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 was given within the stated period of seven days after service of the bankruptcy notice. In the context of this case, the last day being 29 June 1992 calculated from 22 June 1992. I reproduce below s. 3(2) and proviso (ii) of the Bankruptcy Act 1967:

> 3(2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:
>
> Provided that a bankruptcy notice -
>
> (i) .....
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

It is also pertinent to reproduce below the relevant portions of s. 3(1)(i) of the Bankruptcy Act 1967:

> A debtor commits an act of bankruptcy... if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him ....a bankruptcy notice under the Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order... and he does not within seven days after service of notice... comply with the requirements of the notice...

It is evident on perusal of the affidavit in support of the debtor's application to set aside the bankruptcy notice (enclosure 11) in particular paragraph 4, the debtor clearly disputes the validity of the bankruptcy notice so that when the solicitors for the creditor were served with a copy of enclosure 11, the creditor can be said to be put on notice that the validity of the bankruptcy notice was being disputed on the ground that the debtor had paid RM3,055 to the creditor, an agreement emanating from both parties outside and different from the judgment in default issued by the Sessions Court, Taiping on 1 November 1991. I would in the circumstances, consider that the affidavit in that form as per enclosure 11 constituted sufficient notice to the creditor within the meaning of s. 3(2) of the Bankruptcy Act 1967 (see *Re Arunachalam ex parte Indian Overseas Bank Ltd* [1968] 1 MLJ 89). But that is not the end of the matter. It has been forcefully argued by Counsel for the creditor that even if the said affidavit (enclosure 11) was sufficient notice per se it still could not

invalidate the bankruptcy notice because it had been served out of time, i e, on 10 February 1993 (enclosure 12) which was 7 months beyond the seven days stated in the bankruptcy notice exclusive of the day of service. In this respect, again the case of *Re Arunachalam exparte Indian Overseas Bank Ltd (supra)* may be of assistance where Chang Min Tat J. (as he then was) said at p. 90:

> On the authorities, it seems to me reasonably clear that where an excess is claimed in the bankruptcy notice and no such notice of dispute of the validity of the notice by reason of such excess is given, then the bankruptcy notice is not invalid, merely by reason of the excess. Where the amount claimed in the bankruptcy notice is in excess and notice, as is referred to in the proviso to s. 3(2) of the Ordinance, is given within seven days after the service of the bankruptcy notice, then the excess becomes relevant and on the authorities the bankruptcy notice is invalid, since it referred to a sum in respect of which the judgment creditor could not have issued execution: I*n re Child, ex p Child* [1892] 2 QB 77
> (Emphasis added).

Counsel for the debtor urged me to exercise my discretion under s. 93(4) of the Bankruptcy Act 1967 and extend the time even after expiration thereof on such terms as the Court seems fit. For clarity, I reproduce below s. 93(4) of the Bankruptcy Act 1967:

> 93(4) Where by this Act or by general rules the time for doing any act or thing is limited, the court may extend the time, either before or after the expiration thereof, upon such terms, if any, as to the Court seems fit.

It is pertinent also to note that even s. 105(1) of the Bankruptcy Act 1967 gives the power to the bankruptcy Court to annul adjudication in certain cases even after the time to appeal had lapsed - see **Halsbury's Laws of England**, Vol. 3, 4th Edn., para 457 and the decision of the English Court of Appeal in *Re Stanger* [1883] 22 Ch. 436 where Cotton LJ said at p. 440:

> No doubt, the twenty-one days have expired within which, under ordinary circumstances, the adjudication might have been questioned by means of an appeal; but the Court has undoubtedly power, if it thinks the parties have made a proper case, to allow the question to be raised after that time. That was expressly decided by the Court of Appeal in *Ex parte Tucker* [1879] 12 Ch D 308.

And in *Re Khoo Kim Hock* [1974] 2 MLJ 29 where there was an application by an undischarged bankrupt for an order annulling the adjudication order under ss. 92(1) and 105(1) of the Bankruptcy Act 1967 for reasons that he ought not to have been adjudged a bankrupt as he was not indebted to anyone and that his own petition was filed under a misconception of law and liability towards his alleged creditor, Mohamed Azmi J. (as he then was) after rejecting the preliminary objections ruled that the bankrupt's application be heard on a date to be fixed by the Senior Assistant Registrar even though the application was made well after the time to appeal had expired.

In the instant case, the position of the debtor is not as bad as in and in *Re Khoo Kim Hock (supra).* Thr creditor's petition (enclosure 6) has not been fixed for hearing. Therefore, I hold that s. 93(4) of the Bankruptcy Act 1967 applies and consequently the time expired is extended forthwith to enable this application (enclosure 11) to be heard.

Next, Counsel for the debtor argued that the debtor has applied to the Sessions Court, Taiping to set aside the judgment in default and consequently urged the Bankruptcy Court to go behind the judgment in default and to enquire into the validity of the debt. *In re Fraser, ex p Central Bank of London* [1892] 2 QB 633 the English Court of Appeal held that the Court of Bankruptcy has power at the instance of the debtor himself, to go behind the judgment and to enquire into the validity of the debt even though the debtor has previously applied in the action to set aside the judgment and his application has been refused. This refusal was subsequently affirmed by the Court of Appeal. In the context of the instant case and in view of s. 92(1) of the Bankruptcy Act 1967 (as set out in the early part of this judgment), **I see no impediment as to why that power to go behind and scrutinize the judgement in default with a toothcomb may not be exercised by the Bankruptcy Court in an application to review, rescind or vary the bankruptcy notice that had been served on the debtor.**

It was contended that after the judgment in default was obtained by the creditor, both parties (creditor and debtor) agreed to settle the sums owed by way of instalments. Such payments were made as per exhibit "KBH-l" dated 31 October 1991 (see enclosure 11). Even the

creditor's petition (enclosure 6) which has not been fixed for hearing bears the following particulars:

> Tolak
>
> Pembayaran kepada akaun dari
>
> 17.8.91 hingga 24.4.92 .... RM2,966.46

As stated earlier, the judgment in default was obtained on 1 November 1991. Yet the debtor continued to pay by instalments for December 1991 till 24 April 1992. It would appear that there were no terms or conditions stipulated by either party to provide for any eventuality of a default in the payment of the instalments. From May 1992 onwards the debtor failed to pay the instalments, hence the creditor's petition (enclosure 6). Again as stated earlier, the creditor did not file any affidavit in reply to the application to set aside the bankruptcy notice. Thus, we have the unchallenged and uncontroverted evidence that both parties agreed to settle the debt by instalments even after the judgment in default was obtained. The proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 was limited to exess demand and therefore not applicable to the instant case where the demand for payment in the bankruptcy notice was not in accordance with the terms of the judgment in default as required under s. 3(1)(i) of the Bankruptcy Act 1967 but was in accordance with the terms of an agreement subsequently entered by the parties. In the circumstances, non-compliance with such notice would not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967. To enforce my reason, I adopt the decision of Gunn Chit Tuan SCJ (as he then was, now the Chief Justice of Malaya) in *Datuk Mohd. Sari bin Datuk Haji Noor v Norwich Winterthur Insurance (M) Sdn.Bhd.* [1992] 4 CLJ 1798 SC especially at p. 1800:

> Similarly in the present case, the terms of the consent judgment were controlled by an outside agreement between the judgment debtor and creditor through their solicitors, and non-compliance with the judgment is not an act of bankruptcy so long as the terms of the judgment are controlled by that outside agreement.

His Lordship further said at p. 1801:

> As we considered that the bankruptcy notice was invalid for the various reasons stated, the appellant's application to set aside the bankruptcy notice in this case should have been allowed.

It is trite law that a statute relating to bankruptcy should be construed in a manner most favourable to the person affected (see *In re North, ex parte Hasluck* [1895] 2 QB 264). In the circumstances, for the reasons adumbrated above, the debtor's application to set aside the bankruptcy notice is allowed with costs. Order accordingly.